ORIGINAL

No. 88-7495

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JACK HOWARD POTTS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

RESPONSE IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Whether in light of the appropriate deference due to state courts concerning the proper scope of inquiry on voir dire, the court is not constitutionally required to allow voir dire questioning concerning potential jurors' views about a defendant's parole eligibility?

2.

Whether the decision of this Court in Ake v. Oklahoma, 470 U.S. 68 (1985), still requires a threshold showing to be made with regard to securing the assistance of non-psychiatric experts and whether there is no requirement that this showing be made outside the presence of the state?

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PART ONE

STATEMENT OF THE CASE

Petitioner, Jack Howard Potts, was indicted in May of 1975 in the Superior Court of Forsyth County, Georgia for the murder of Michael Priest. Petitioner was convicted and received the death penalty. On appeal, Petitioner's convictions and sentences were affirmed by the Supreme Court of Georgia in Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978).

Petitioner unsuccessfully pursued a state habeas corpus petition and then filed an application for federal habeas corpus relief upon which Petitioner was eventually granted relief on January 7, 1983, in the form of being granted a new trial as to sentence with respect to Petitioner's Forsyth County, Georgia, conviction. The Eleventh Circuit Court of

Appeals affirmed the granting of relief in Potts v. Zant, 734 F.2d 526 (11th Cir. 1984), rhng. denied, 764 F.2d 1370 (1985), vacated, ___ U.S. ___, 106 S.Ct. 3328 (1986), on remand sub. nom. Potts v. Kemp, 814 F.2d 1512 (11th Cir. 1987).

Petitioner then returned to the Superior Court of Forsyth County for retrial as to sentence. However, Petitioner was granted a change of venue to the Superior Court of Richmond County, Georgia and a resentencing trial was conducted in January of 1988. Petitioner was resentenced to death for the murder of Michael Priest on January 14, 1988. Petitioner's motion for new trial was denied by the trial court on May 6, 1988.

Petitioner appealed to the Supreme Court of Georgia which affirmed Petitioner's new death sentence in Potts v. State, 259 Ga. 96, 376 S.E.2d 851 (1989). This petition for a writ of certiorari seeks to review the decision of the Supreme Court of Georgia affirming Petitioner's death sentence imposed at his resentencing trial.

PART TWO

STATEMENT OF THE FACTS

The evidence presented at Petitioner's resentencing proceeding conducted in the Superior Court of Richmond County, established that Petitioner had confessed to a murder taking place in Daytona Beach, Florida, in May 1975. Police officers from Daytona Beach Florida, introduced photographs of this crime scene.

With regard to the murder of Michael Priest in Forsyth County, Georgia, Norma Blackwell Scott testified that in January, 1975 she lived in Forsyth County and started living with Petitioner in the spring of 1975. On May 8, 1975, Ms.Blackwell was with the Petitioner at Bernice Burnett's trailer in Cumming, Georgia. Ms. Blackwell was riding with Petitioner on this date when he shot the window out of the car in which they were traveling. When they got back to Ms. Burnett's trailer, Eugene Snyder arrived in his pick-up and Petitioner asked Eugene Snyder to take him to his brother's house to get his car. Eugene Snyder was accompanied by Elaine Glaze.

Petitioner drove Snyder's truck, with Norma sitting next to him, Elaine Glaze beside Norma and Eugene Snyder sitting next to the door. Both Petitioner and Snyder had been drinking. During the trip, the group stopped at a beer store in Marietta to buy beer and liquor and on the way they met Petitioner's brother driving another car. During the drive, Petitioner kept driving fast and Snyder argued with him about tearing up his truck.

Norma Blackwell had a pearl handled .22 pistol that Petitioner had asked her to keep for him and Petitioner had placed a big gun on the dash of the truck.

After the group stopped and got the muffler of the truck cut off, the group was riding up Sewell Mill Road, when Snyder

heard a sound like a firecracker going off in his ear. When Snyder turned around he saw that Petitioner had a gun and saw that blood was running down his own shirt. Snyder grabbed the truck key out of the ignition switch and the truck slowed down. Snyder asked the Petitioner to take him to the doctor and Petitioner agreed if Snyder would put the key back in the switch. Petitioner did so and at this time, Petitioner shot Snyder again on the left side of his nose. Both Norma Blackwell and Elaine Glaze witnessed the Petitioner reaching across them and shooting Snyder in the head. Ms. Glaze was screaming and Petitioner told her that if she did not hush he would shoot her too.

Snyder pretended that he was passed-out while the Petitioner got out of the truck and came around to remove Snyder from the truck. Snyder took the keys out of the switch and threw them into the bushes. Petitioner dragged Snyder from the truck off the side of the road and emptied his pockets. Petitioner told Glaze and Blackwell to wipe down the truck.

Petitioner left to find a new means of transportation and Elaine Glazed begged Norma Blackwell to let her go. Subsequently, Petitioner came driving up in another man's car, with Michael Priest behind the wheel. Michael Priest got out of the car to try to help Snyder, but Petitioner ordered him to drive at gun-point.

After Petitioner and Glaze and Blackwell left in Michael Priest's car, Eugene Snyder was able to get help and he survived the shooting.

The evidence established that Petitioner had gone to the home of Michael Priest's parents-in-law and informed everyone there, including Michael Priest and his wife, Delores, that there had been an accident and he needed a ride. Petitioner had blood all over him and Michael Priest agreed to take the Petitioner to Roswell or to a clinic. Delores Priest watched Petitioner and her husband leave and she saw them stop and pick up two girls.

With Michael Priest driving his own car occupied by Petitioner, Blackwell and Glaze, they headed back to Bernice Burnett's trailer, stopping en route to get the car fixed. Michael Priest was scared and begging for his life while he was being taunted by the Petitioner who would cock the gun and then release the trigger. Petitioner shot a hole through the top of the car. Elaine Glaze testified that while he was driving, Michael Priest kept saying not to hurt him because he had not done anything to the Petitioner. Petitioner told Michael Priest, "You'd better pray to me, I'm your God."

At Petitioner's orders, they drove until they stopped on a long, dark road. Michael Priest begged Petitioner not to hurt him, that he would give him money, that he would give him anything. Petitioner forced Michael Priest to go into some high weeds on the side of the road and Michael Priest got down on his knees. Petitioner shot Michael Priest. Michael Priest's body was discovered by authorities on May 9, 1975, with a gunshot wound to his head.

After killing Michael Priest, the Petitioner told Elaine Glaze to get out of the car, but due to Ms. Glaze begging, he did not kill her. They returned to Bernice Burnett's trailer in Cumming where they burned their clothes. The burned remnants of these clothes were recovered by the police.

After leaving the trailer in Michael Priest's car, they stopped in Cumming, Georgia, and cleaned the car out and got a dealer's tag to go on the car instead of the tag that it had already had. When they stopped at a hotel on the way to Florida, Elaine Glaze got away and eventually went to the police.

Eventually, police caught up with the Petitioner and Norma Blackwell, but Petitioner shot at a policeman in the process. Both the Petitioner and Norma Blackwell were arrested and charged in both Forsyth and Cobb Counties. Norma Blackwell eventually pled guilty to aggravated assault and spent fourteen months in jail.

Norma Blackwell also testified concerning a visit that she made to Florida with Petitioner when he came back to the motel room they shared, with blood on his shirt and told her that he had killed a man. They took the Petitioner's bloody shirt and buried it on the beach, headed back to Georgia, and threw guns off a bridge near Macon.

The remaining evidence presented at trial dealt with the appellant's escape from Forsyth County jail on September 19, 1987. Jailer Kelli Charles testified at trial that she had gotten close to the Petitioner at the time that she was in charge of security for him and that in September of 1987, she took a gun to the Forsyth County jail and gave it to Jack Potts. Petitioner told her that he would escape and God help who was in between him and the door. While Ms. Charles was on vacation, Petitioner in fact did escape, while holding officer Bill Crawford as a hostage. During the escape, officer David Bennett fired once at Petitioner and hit him in the arm and Petitioner fired at him.

Officer Bennett was eventually able to apprehend the Petitioner after he escaped from the jail itself, various officers having given chase to the Petitioner once he left the jail. Ms. Charles was charged for her involvement in the escape and entered a plea on January 4, 1988, that she would get a potential ten year sentence and that the state would make no recommendation as to sentence, but she would be required to testify as part of the plea agreement. Two days after the escape, Petitioner, in the presence of his attorney, asked to speak to Chief Investigator Matthews in the holding cell at the Forsyth County jail. At this time, Petitioner told Investigator Matthews, "I want you to cut Kelli loose, and if you'll cut Kelli loose, I'll give you some dead bodies." When investigator Matthews asked, "Where," Petitioner replied, "In Florida."

Further facts will be discussed as is necessary to address the allegations of the petition.

REASONS FOR NOT GRANTING THE WRIT

I. NO CONSTITUTIONAL ERROR HAS BEEN DEMONSTRATED DUE TO THE RULING BY THE SUPREME COURT OF GEORGIA THAT THERE WAS NO ERROR IN EXCLUDING EVIDENCE OF PETITIONER'S INELIGIBILITY FOR PAROLE IF GIVEN A LIFE SENTENCE.

Petitioner asks this Court to review the decision of the Supreme Court of Georgia that Petitioner was not constitutionally entitled to present evidence of his ineligibility for parole if given a life sentence, by specifically injecting the issue of parole into the voir dire proceedings. As Petitioner concedes, both in this case and in previous decisions under Georgia law, the Supreme Court of Georgia has held that a criminal defendant cannot question jurors about their conceptions or alleged misconceptions about parole law. Potts v. State, 259 Ga. 96, 102, 376 S.E.2d 856 (1989), citing Horton v. State, 249 Ga. 871(4), 295 S.E.2d 281 (1982) and Quick v. State, 256 Ga. 780(9), 353 S.E.2d 497 (1987).

The Georgia Supreme Court expressed its opinion that, "a defendant's parole eligibility is not, and ought not be, an issue considered by the jury in the sentencing phase of a death penalty case." The Georgia Supreme Court held the following:

> The jury should not be encouraged to add stipulations, conditions, or recommendations of no parole to its verdict. Nor should the jury be instructed, implicitly or explicitly, that a defendant's release on parole is a matter governed solely by the illimitable discretion of the Board of Pardons and Paroles.

imposed, did not find that parole eligibility was a matter which was prohibited under Maryland law but in fact, noted that under Maryland law, "the legislature clearly articulated a policy in favor of greater jury involvement in matters of parole where the jury determines the sentence." Id. at 1294. No such articulated policy exists under Georgia statute or case law and, therefore, Doering v. State, does not warrant the granting of certiorari to review the decision of the Georgia Supreme Court excluding parole eligibility evidence and prohibiting the voir dire of potential jurors on the subject of parole.

This Court should not grant a writ of certiorari to consider this issue, but rather, should properly defer to the Georgia Supreme Court's decision to exclude this evidence based on a specific Georgia statute and case law.

II. THIS COURT SHOULD NOT GRANT THIS PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE QUESTION OF WHETHER THE SUPREME COURT OF GEORGIA ABUSED ITS DISCRETION AS TO PETITIONER'S REQUEST FOR THE ASSISTANCE OF EXPERTS.

Petitioner asks this Court to review the finding of the Georgia Supreme Court that the trial court did not abuse its discretion in denying Petitioner's request for expert assistance. Potts v. State, at 100. Petitioner argues that this Court should use his case as a "vehicle" to determine whether the Court's decision in Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087 (1985), requires that an indigent defendant be permitted to apply for funds for non-psychiatric experts on a "ex parte basis."

Petitioner contends that in Ake v. Oklahoma, this Court ruled that an defendant must be permitted to make "an ex parte threshold showing" to the trial court that a defendant's sanity is likely to be a significant factor in his defense, thereby establishing the need for the assistance of a psychiatrist. Ake v. Oklahoma, at 1096. However, Respondent respectfully submits that there was no abuse of the trial court's discretion in this case, as Ake does not mandate an ex parte threshold showing in the sense that has been asserted by the Petitioner.

Essentially, Petitioner wished to have hearings on his motion for funds outside the presence of the state, in connection with arguing his motion that he needed funds to hire an investigator. Petitioner's trial counsel stated, "As far as the application for funds for investigator, I wish to disclose those to the court ex parte." (Trial transcript, Vol. 6, p. 131). The district attorney opposed the conducting of an ex parte hearing without setting out some prima facie basis for the need to conduct such an ex parte hearing. (Trial

transcript, Vol. 6, p. 132-133). Counsel for Petitioner expressed his concern with an alleged "premature disclosure" of matters which would allegedly lessen their effectiveness for presentation in Petitioner's behalf. (Trial transcript, Vol. 6, p. 160-161).

The court informed counsel that in considering the application for funds, there would not need to be "full disclosure" of what use an investigator would be to Petitioner. (Trial transcript, Vol. 6, P. 162). The trial court stated:

> Simply because the Court may award the funds for an investigator or psychiatrist or whatever in any case, does not mean, I don't think, that the Defendant is obligated to disclose whatever might result from the investigation or those examinations to the state.

(V. 6, 162-163).

The trial court indicated its understanding that the cases cited by the Petitioner including Ake v. Oklahoma, do not utilize the term "ex parte" to mean "only in the absence of the other party." (Trial transcript, Vol. 6, p. 163). The court specifically told Petitioner's trial attorney, "I'm not suggesting to you that you have to provide all of the details in order to get an award of funds." (V. 6, 165). The trial court gave counsel for the Petitioner $1,000.00 as investigative resources and left open the possibility that additional money could be awarded, simply holding that the court was not going to write the defendant a "blank check."

Initially, contrary to Petitioner's assertion, Respondent submits that "ex parte" does not generally mean, nor does it in this context, that the hearing should be held outside the presence of the other party. As defined in Black's Law

Dictionary, Revised 4th Edition, the term "ex parte" means "on one side only; by or for one party; done for, in behalf of, or on the application of, one party only." The definition further states, "a judicial proceeding, order, injunction, etc. is said to be ex parte where it is taken or granted at the instance and for the benefit of one party only, and without notice to or contestation by, any person adversely interested." Therefore, Respondent submits that the ex parte motion for funds referred to in Ake does not necessarily refer to "outside the presence" of the other party, but simply refers to an untraversed motion for the sole benefit of the defendant. Petitioner has cited no applicable authority supporting his contention that he is entitled to a hearing on funds outside the presence of the state, rather than a hearing uncontested by the state.

Further, a review of the hearings on the various motions for funds filed by the Petitioner reveals that the trial court did not unreasonably require this Petitioner to disclose in detail the reasons why certain funds or certain experts were sought, but rather simply required that the Petitioner do more than rely on his written motion for funds and supply the court with information on the amount of funds needed and their general purpose. The trial court also left the possibility open for defense counsel to renew any denied motions for funds or to ask for additional funds if necessary. (See e.g., Vol. 17, pp. 1030, 1032-1033). The colloquy between the trial court and trial counsel for Petitioner revealed that the trial court was simply trying to elicit from trial counsel in this case a threshold showing of why the experts were needed and was not requiring the defense to disclose any "secret information" or to describe in detail what an investigator would specifically be asked to investigate.

Respondent submits that the Supreme Court of Georgia was correct in finding that the trial court did not abuse its discretion in refusing to allow a hearing on Petitioner's

motion for funds to be made outside of the presence of the state, but instead merely required that a bases for such motions be provided for the court in order to determine the necessity of granting such funds. In this case, there was no forcing of an indigent defendant to disclose his "entire defense strategy" to secure funds, as argued by the Petitioner and, therefore, this is not an appropriate vehicle in which this Court should determine the parameters of Ake with its reference to motions for funds for psychiatric experts being made on an "ex parte basis."

CONCLUSION

WHEREFORE, this Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia, as it is clear that no questions of exceptional importance are presented for this Court's resolution in the factual context of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, SUSAN V. BOLEYN, a member of the Bar of the Supreme Court of the United States and counsel of record for Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief upon counsel for the Petitioner by depositing a copy of same in the United States mail with proper address and adequate postage to:

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This 28th day of July, 1989.

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